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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **DAVID GLEN BOOTH,** **Defendant and Appellant.**	**A122634** **(Marin County Super. Ct. No. SC152079A)**

David Glen Booth (Booth) appeals from a judgment of conviction imposed after a jury found him guilty of residential burglary and receiving stolen property. (Pen. Code, §§ 459, 496, subd. (a).) He contends: (1) the court erred by denying his motion to suppress a witness's identification of him as the perpetrator of the burglary; (2) his confrontation clause rights were violated when the court barred him from cross-examining a witness regarding her potential biases; (3) the court erred in admitting evidence of uncharged offenses under Evidence Code section 1101, subdivision (b); and (4) the prosecutor committed misconduct in closing argument. We will affirm the judgment.

I. *FACTS AND PROCEDURAL HISTORY*

An amended information charged Booth with the burglary of the home of Brenda Kiesel (§ 459)[1] and receipt of stolen property belonging to Mohsen Naser-Tavaklian (§ 496, subd. (a)).

Count one was alleged to be a serious felony within the meaning of section 1192.7, subdivision (c)(18). Further as to count one, it was alleged that Booth was ineligible for probation (§ 462, subd. (a)) and had six prior serious felony convictions for purposes of section 667, subdivision (a)(1). As to all counts, it was alleged that Booth had: seven prior convictions for purposes of section 1170.12, subdivisions (a)-(d), and section 667, subdivisions (b)-(i); four prior convictions for purposes of section 667.5, subdivision (b); and eight prior convictions for purposes of section 1203, subdivision (e)(4).

Booth waived his right to a jury trial on the prior convictions. Trial on the prior convictions was bifurcated from the trial on the main charges.

A. *Pre-Trial Motions*

The court issued three pre-trial rulings that are the subject of this appeal. Each will be discussed at greater length *post*.

1. *Denial of Motion to Suppress Eyewitness Identification*

Booth filed a motion to suppress evidence of an identification of him as the perpetrator of the burglary by eyewitness Leslie Benjamin, on the ground the identification resulted from an improperly suggestive field show-up procedure and was unreliable. The court denied the motion.

2. *Preclusion of Impeachment of Eyewitness on Custody Status*

In response to motions by Booth and the prosecutor, the court ruled that the defense could introduce evidence that witness Kirsten Baker had been convicted of a felony, but could not introduce evidence that she was incarcerated at the time of trial.

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[1] Except where otherwise indicated, all statutory references are to the Penal Code.

3. *Admission of Prior Uncharged Offenses*

The court ruled admissible, as relevant to his intent as to the count one burglary charge, evidence of Booth's entry into a residence in 1990 and attempted entry into a residence in 1997, both of which resulted in convictions for burglary (§ 459).[2]

B. *Evidence at Trial*

1. *Count One - Burglary of Kiesel Residence*

Eyewitness Leslie Benjamin (Benjamin) testified that, while walking home during her lunch break on February 15, 2007, she noticed a man walking 20-40 feet in front of her, looking into people's yards. As Benjamin walked toward the door of her house, the man (later identified as Booth) walked to a house belonging to Brenda Kiesel (Kiesel) across the street. The man was wearing jeans and a blue denim top.

Thinking the man's behavior was odd, Benjamin watched him from the window of her home. She had a direct view and could see what was happening "very well."[3] The man knocked on Kiesel's front door, but kept looking at the street. When no one answered, he walked toward the back of the Kiesel home. Benjamin called 911.

Minutes later, Benjamin – who could see into Kiesel's house through its plate glass window – observed the man walking in the living room of the house and looking through Kiesel's cabinets. She called 911 again.

Although Benjamin initially told 911 that the man was 20-30 years old, she later described him as in his 40s. She further advised 911 that the man was wearing blue jeans and a blue denim shirt.

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[2] The court also ruled that certain evidence relevant to count two (receipt of stolen property belonging to Naser-Tavaklian) would be admissible for purposes of establishing Booth's intent in regard to count one (burglary of Kiesel). The evidence was admitted and the court subsequently instructed the jury accordingly. No issue is made of this matter in the appeal.

[3] Booth suggests there were pine tree branches obstructing her view. Benjamin testified, however, that "the branches are up high enough that you can see underneath [them]."

Benjamin next saw the man exit Kiesel's front door and begin to walk down the street. Just then, a deputy sheriff (Deputy Henderson) pulled up and started talking to him. Benjamin was 100 percent certain the person with whom the deputy was speaking was the man she saw inside Kiesel's residence. At trial, she was also "certain" that this person was the defendant Booth.

Marin County Sheriff's Deputy Christopher Henderson testified that he was dispatched to 16 Locust Avenue to investigate a trespasser or suspicious person, described as a white male, 20-24 years old, medium build, with brown or dark hair, wearing denim. When the officer arrived, he saw a man matching that description in front of the house, although he looked "too old." The man walked by Henderson, a "little bit fast," looking down at the sidewalk. At trial, Deputy Henderson identified the man as Booth.

Deputy Henderson identified himself to Booth as a sheriff's deputy and asked if he had come from the Kiesel house. Booth stuttered, "no, no, no," and appeared nervous. Then he turned and ran off "really fast."

The deputy chased Booth on foot down Locust Avenue and into an office parking lot on an adjacent street. He lost sight of Booth for 2-3 seconds when Booth ran behind a dumpster, then continued the chase through a garden and down an alley, following the sound of Booth's footsteps. The officer heard wood breaking and, regaining sight of Booth, observed him go through a broken fence and around the corner of a large apartment building. Deputy Henderson pursued but lost sight of him.

Other officers had been dispatched to the area and were looking for the intruder. A woman (Kirsten Baker) on the deck of an apartment building yelled to them that she had seen what happened, and Deputy Henderson relayed what she said to other officers.

Kirsten Baker (Baker) testified that, around 2:00 p.m. on February 15, 2007, she heard police radios and looked out from her apartment balcony. She saw a man climb over a fence, take off a blue shirt and try to throw it back over the fence. Wearing a bright orange shirt, the man ran until he disappeared next to some foliage. Baker told officers what she had seen, where the man was, that he was now wearing an orange shirt,

and where they could find the blue shirt he discarded. She saw the officers retrieve the blue shirt.[4]

Marin County Sheriff's Deputy Ron Scranton testified that he was dispatched to the scene. While looking for the suspect, he observed a man with an orange shirt ducking behind a bush. The man, breathing heavily and sweating, was apprehended. At trial, he identified that man as Booth.

Officer Nelson of the Ross Police Department retrieved Booth's blue shirt, using Baker's directions. Under the shirt or in the shirt pocket, he also found a box of earrings. The officer gave the box and earrings to Deputy Henderson, who later showed them to Kiesel, who identified them as hers.

Deputy Henderson contacted Benjamin and drove her to where Booth had been detained. On the way, Deputy Henderson explained to Benjamin, using a form prepared by the sheriff's department, that the person detained may or may not be the person responsible for the crime, it was alright for Benjamin to say he was not the perpetrator, and being fair was "really paramount." Benjamin indicated that she understood and signed the form.

As Deputy Henderson drove slowly by Booth, Benjamin saw that his hands were behind him, a police officer was holding his arm, and other officers were standing nearby, although she "wasn't really paying attention to that." She identified Booth as the Kiesel home intruder and said she was 100 percent certain he was the person she saw coming out of Kiesel's home.

Kiesel testified that when she returned to her home in the afternoon of February 15, 2007, she saw police cars and learned from a neighbor that someone had broken into her home. As officers accompanied her through the house, she discovered, among other things, that a window had been broken, doors to a chest in the dining room were open, a jewelry drawer in the bathroom had been emptied out onto the bed, and

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[4] On cross-examination, Baker acknowledged that she had a felony conviction for driving under the influence with three prior convictions for the same offense.

other drawers in the bedroom had been emptied. Deputy Henderson showed Kiesel the box of earrings found in or with the blue shirt, and she identified them as hers.

Later that day, Kiesel reported additional items missing from her home. Deputy Henderson and other officers searched the route of his pursuit of Booth again, but none of the items was found. After several more days, Kiesel reported to police other missing items, which were never recovered.

2. *Receiving Stolen Property*

Mohsen Naser-Tavaklian testified that he returned home on February 13, 2007, and found that his front door was unlocked and a radio that he had left on had been turned off. He called 911. When the police arrived they went inside and found a broken window, glass on the floor, a broken armoire with items on the floor, drawers pulled out and emptied onto the floor, and closets ransacked. A portable computer, digital camera, and camcorder were missing.

During their investigation of the Kiesel burglary on February 15, 2007, sheriff's deputies found an unlocked car registered to Booth in a restaurant parking lot. Inside, officers found Booth's wallet, driver's license, and identification cards. A portable computer was also found. By looking at the computer's email program, officers determined the computer belonged to "Mohsen [Naser-]Tavaklian." At trial, Naser-Tavaklian identified the computer as his.

3. *Evidence of Booth's Uncharged Crimes*

The jury was advised of the parties' stipulation that Booth had pled guilty to the residential burglary of a Mill Valley home in 1990. The following stipulation was read by the court to the jury: "The parties agree that on May 29, 1990, shortly before noon, the defendant entered the residence, located at 540 Ethel Avenue, Mill Valley, California, through the kitchen window. The screen had been torn off most of its frame and the window was slid partially open. One of the [residents], who was in a bedroom at the time, heard the noise, went to the kitchen to investigate, and saw the defendant, David Glen Booth, standing inside the residence near the front door. The defendant was holding a green case containing a 35 [millimeter] camera that belonged to the resident. When the

defendant saw the resident he turned and ran out through the front door. The resident then called 911. [¶] The parties also agree that [at] approximately 11:57 a.m. that same day, Deputy Lance Mannaner of the Marin County Sheriff's Office in response to the 911 call checked the surrounding area in search of the defendant. At approximately 12:20 p.m., Deputy Mannaner saw the defendant running down the street. Upon seeing the [deputy,] the defendant stopped running. Shortly thereafter Deputy Mannaner contacted the defendant [and] found the green case and 35 [millimeter] camera in the defendant's possession. [¶] The parties further agree that as a result of this incident the defendant [pled] guilty on July 24, 1990, to a violation of Penal Code Section 459, also known as residential burglary."

Additional evidence was presented concerning Booth's break-in at a Petaluma residence in 1997. The victim, Michael Lantier, testified that in the evening on May 7, 1997, he heard a window breaking downstairs in his home. His wife called 911. Lantier, armed with a baseball bat, went downstairs and discovered Booth coming through a kitchen window. He told Booth to "stop" and hit him with the bat; Booth retreated. Lantier went outside and hit Booth with the bat again; Booth crawled into a bush. The police arrested both Booth and Lantier.

The court instructed the jury that the prior offense evidence could be considered only for purposes of evaluating Booth's intent in regard to count one (burglary).

C. *Verdict and Sentence*

The jury found Booth guilty on both counts. In a bifurcated trial, the court found the prior conviction allegations to be true.

The court sentenced Booth to an indeterminate term of 57 years to life, followed by a determinate term of 30 years, comprised of the following: an indeterminate term of 32 years to life for count one; an indeterminate term of 25 years to life on count two; and an additional 30-year determinate term for Booth's section 667, subdivision (a) prior convictions.

This appeal followed.

II. *DISCUSSION*

Booth contends: (1) the court erred by denying his motion to suppress Benjamin's identification, because it was the product of impermissibly suggestive pretrial procedures; (2) his confrontation clause rights were violated when the court barred him from cross-examining Baker regarding her in-custody status at the time of her trial testimony; (3) the court abused its discretion in admitting evidence of uncharged offenses; and (4) the prosecutor committed misconduct in closing argument. We consider each argument in turn.

A. *Motion to Suppress Benjamin's Identification*

Booth contends the court erred by denying his motion to suppress evidence of Benjamin's in-field identification on the day of the burglary, claiming it was the product of an impermissibly suggestive show-up procedure and unreliable. Because the in-field procedure was improper, he argues, Benjamin's identification of Booth at trial was tainted and should have been excluded as well.

We begin with a closer look at the evidence presented at the hearing on the motion to suppress.

1. *Evidence at the Hearing*

Benjamin's testimony at the hearing was nearly identical to her testimony at trial. On February 15, 2007, she saw a man walking 20-40 feet ahead of her while she was walking down the street. As she went towards her home, he went toward her neighbor's home across the street. At that point, she had not seen the man's face that well.

From her own home, she observed the man knock on her neighbor's door and then go to the back of the house. She called 911 and described the man to be 20-30 years old. She then saw him inside the house and called 911 again. She told the 911 operator that the suspect was "white," with brown hair, of medium height, wearing blue denim jeans and a blue, possibly denim, shirt. As the man came out of the Kiesel home, Benjamin saw his face and realized he was older than she had thought, so she told the 911 operator that the suspect was in his 40's. Benjamin watched the man speak with a police officer in front of the Kiesel residence.

About 30 minutes later, Deputy Henderson asked her to take a look at a person who had been apprehended. Henderson explained she was to tell him whether the man was the perpetrator or not, and he gave her a form she read and signed. She was driven to a place where the man was standing, apparently handcuffed, with one other officer at his side and other officers about 10-15 feet away. Deputy Henderson drove her slowly by the suspect, giving her "plenty of time" to get a good look at him. She told Deputy Henderson that she recognized him as the man she had seen in Kiesel's residence. She was "pretty confident" in her identification, and she "recognized his face and, of course, . . . recognized what he was wearing," although he looked taller than she recalled.

Deputy Henderson testified to the same effect. He recalled that he contacted Benjamin at 2:30 p.m. and asked if she was willing to do a field identification of the suspect. She agreed, although she appeared frightened. Henderson gave Benjamin a form prepared by the Sheriff's Department. He told her to be fair and to "treat it like a family member." He told her: "I don't care one way or another if you pick somebody or don't pick somebody." He also told her it is good to clear somebody, because it's fair and the police would not proceed in the wrong direction on the case. Benjamin said that she understood.

Deputy Henderson reviewed the form with her before she signed it. He particularly reviewed with her the fifth paragraph, which he modified because it was a field line-up rather than a photo line-up. As so modified, paragraph 5 read: "You are requested to view a person in the field to determine if you can identify anyone as being involved in the offense you witnessed. It is *not* known if the person who committed the offense is shown, only you will know. *Do not feel obligated to identify anyone, but do so only if you recognize the offender. You are not obligated to identify anyone. It is just as important to free innocent persons from suspicion as to identify guilty parties. Do not make any inference of guilt from law enforcement presence or custody*. You will not be told the results of the line-up regarding any selection you have made. Please do not discuss the case with other witnesses nor indicate in any way that you have identified anyone." (Italics added.)

With Benjamin in the front seat, Henderson drove slowly by the suspect, who was with a deputy. Benjamin had covered her face with her hands, but after taking her hands down "for a period of time" and looking, she said, "'Oh, it's him.'" Deputy Henderson told her she needed to say whether the identification was positive, probable or nonexistent. She replied that she was "positive" and asked the officer to take her home. Deputy Henderson marked the "positive" box on the form, and Benjamin placed her initials next to paragraph 5.

The court denied the motion to suppress, explaining as follows: "So although there may be some inherent suggestiveness to a single person show-up in the abstract, in this particular case, the circumstances suggest just the opposite. [¶] This was, as [the prosecutor] put it, a textbook show-up, and oftentimes when someone is apprehended at the scene, as the defendant was, officers need to determine whether or not they do have the right person. [¶] It sounds like Deputy Henderson was extremely fair and reasonable in the conduct of the investigation and treated it as an investigation, advising Ms. Benjamin that it's important to exonerate the innocent as much as to identify the responsible party. There's really nothing about the circumstances here that suggest it was suggestive, and in particular, unduly or unnecessarily suggestive. [¶] So the court need not move on to the next stage of the analysis. Nevertheless, in case someone somewhere disagrees with that conclusion, the identification here is highly reliable. [¶] The defendant was seen and identified by the officer at the very moment that she, Ms. Benjamin, still had sight on him; so there was a constant chain from his leaving the house until he was seen by the deputy. [¶] That person was identified as the same person picked up later and identified by Ms. Benjamin, so it seems like the identification was highly reliable, and the motion to exclude any identification in court or otherwise is denied."

2. *Legal Standard*

A defendant has been denied due process when his conviction stems from an unnecessarily suggestive identification procedure that was so impermissibly suggestive as

to give rise to " 'a very substantial likelihood of irreparable misidentification' " under the totality of the circumstances. (*Manson v. Brathwaite* (1977) 432 U.S. 98, 116 (*Manson*).)

In deciding the constitutionality of the identification evidence, the court first determines whether the pretrial identification procedure was unduly suggestive and unnecessary. (*Manson, supra,* 432 U.S. at pp. 104-107.) If it was, the court must then decide whether the identification was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. (*Ibid; People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.)

We apply the standard of independent review. (*People v. Kennedy* (2005) 36 Cal.4th 595, 608-609.)[5]

3. *The Field Show-Up Was Not Unduly Suggestive*

An identification procedure is suggestive when it focuses on a single individual. (*U.S. v. Montgomery* (9th Cir. 1998) 150 F.3d 983, 992.) That does not mean, however, that an in-field identification procedure with only one suspect is *unduly* suggestive or unnecessary, to the point its admissibility at trial violates the defendant's due process rights. (*Stovall v. Denno* (1967) 388 U.S. 293, 301-302 [despite its suggestiveness, the presentation to the witness of the suspect alone, handcuffed to police officers, was permissible where it was unknown how long the victim would live]; *Neil v. Biggers* (1972) 409 U.S. 188, 199 [the issue is whether the identification was reliable even though the identification procedure was suggestive]; *Manson, supra,* 432 U.S. at p. 114

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[5] Where a witness has been subjected to an impermissibly suggestive and unreliable identification procedure, an in-court identification of the defendant by the witness must also be excluded unless the prosecution shows by clear and convincing evidence that the in-court identification is based on her independent recollection of her observations at the time of the offense. (*People v. Caruso* (1968) 68 Cal.2d 183, 189-190.) We need not address the issue here, because the identification procedure was not unduly or unnecessarily suggestive.

[admissibility of identification testimony turns on reliability in light of several factors, weighed against the suggestiveness of the identification procedure].)

For decades, California courts have upheld in-field identifications of a single suspect. (See, e.g., *People v. Craig* (1978) 86 Cal.App.3d 905, 913; *People v. Anthony* (1970) 7 Cal.App.3d 751, 764-765.) "Appellant overlooks the fact that the law *favors* field identification procedures when in close proximity in time and place to the scene of the crime." (*People v. Richard W.* (1979) 91 Cal.App.3d 960, 970 (*Richard W.*), italics added.) The rationale for the view favoring single-suspect identifications in the field is that the suggestiveness of the procedure is " 'offset by the likelihood that a prompt identification within a short time after the commission of the crime will be more accurate than a belated identification days or weeks later.' " (*Ibid.*) The choice has been made to permit in-the-field identifications notwithstanding the element of suggestiveness " 'because the immediate knowledge whether or not the correct person has been apprehended is of overriding importance and service to law enforcement, the public and the criminal suspect himself.' " (*Ibid.*)

The in-field identification procedure in the matter before us is akin to the ones upheld in *Richard W.* and *Craig*. In *Richard W.*, the defendant was identified while he was sitting in the back of a patrol car shortly after a burglary. (91 Cal.App.3d at p. 969.) In *Craig*, the defendants had been placed inside a police car, surrounded by police officers. (86 Cal.App.3d at p. 914.) Booth does not distinguish *Richard W.* or *Craig* from this case, and in keeping with those decisions, we conclude the in-field identification procedure was not unduly or unnecessarily suggestive.[6]

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[6] California cases indicate that an in-field show-up of a single suspect is not in itself unduly suggestive. *Manson* arguably indicates that a show-up with a single suspect is unduly suggestive unless the identification is sufficiently reliable under the circumstances. We need not consider whether this analytical distinction actually exists, since Benjamin's identification of Booth was sufficiently reliable anyway, as we explain next in the text.

4. *Benjamin's Identification Was Reliable*

In any event, Benjamin's identification was reliable in light of the relevant factors: her opportunity to view the perpetrator; her degree of attention when viewing him; the accuracy of her prior descriptions of the perpetrator; her level of certainty in her identification of Booth; and the time between the crime and the identification. (See *Manson*, *supra*, 432 U.S. at p. 116.)

Benjamin had a significant opportunity to view Booth when he was outside Kiesel's house, inside Kiesel's house, and speaking to the officer in front of Kiesel's house before he took flight. She was attentive, in that she was looking at the man expressly because she suspected something was amiss – enough that it prompted her to call 911 twice. Her description of the suspect was accurate – a white male wearing blue denim clothing – and although she initially thought he was in his 20's, she later advised that he was in his 40's, closer to his actual age. At the time of her identification, she told Deputy Henderson that she was positive that Booth was the burglar. Only about 30 minutes passed between the time she saw the individual and the time she identified him. These circumstances, when weighed against the degree of suggestiveness of the in-field show-up, support the conclusion that Benjamin's identification of Booth was sufficiently reliable to warrant admission of the identification evidence.

Booth contends that Benjamin's identification was unreliable because she identified him based on his clothing rather than his facial features or physical characteristics. However, Benjamin described not just Booth's clothing, but also the fact that he was a Caucasian, he was male, he had a medium build, he had brown hair, and he was in his 40's. Moreover, Benjamin specifically testified that her confidence in identifying Booth stemmed from the fact that she "recognized his *face*" as well as "what he was wearing." (Italics added.)

Booth next urges that Benjamin's identification was unreliable because at the hearing she described his clothing in the following ways, which he contends are inconsistent: "denim jeans and a shirt," "blue jeans and a denim top," "a blue top – I didn't actually think it was denim, although I did say that," a shirt with a "sort of denim

look to it," and a shirt "like a blue Levi – you know, it seemed like a snapped shirt." Not unreasonably, Benjamin appeared to associate the color blue with denim, the fabric from which blue jeans are made. If her testimony reflects an inconsistency, it certainly was not an inconsistency that would lead any reasonable person to view her as an unreliable witness.

Booth argues that "Deputy Henderson confirmed that Ms. Benjamin's prior descriptions of the intruder were not accurate; he testified that her account of the subject's age was 'way off.' " This is a red herring. As Deputy Henderson explained at the hearing, he thought the age was off because he had been told by dispatch that the suspect was in his *20's*, and the man he saw in front of Kiesel's home was 40-50 years old. At that time, the deputy was unaware that Benjamin had later told 911 that the suspect was in his 40's. As it turns out, Benjamin's belief that the burglar was in his 40's, and Deputy Henderson's belief that Booth was 40-50 years old, *corroborated* each other. In any event, Benjamin observed the man come out of the house and be confronted by the deputy, so there is no question whatsoever that the man with whom Deputy Henderson spoke – identified as Booth – was the burglar.

Booth further argues that Benjamin did not really focus on him at the in-field show-up, because in her fear she tried to hide her face and wanted to finish the identification procedure so she could return home. His argument is unpersuasive. In the first place, Benjamin testified that she had "plenty of time" to get a good look at the suspect at the in-field identification. Moreover, notwithstanding her fear, Benjamin identified Booth at the show-up and proclaimed she was positive of her identification; if fear had really overwhelmed her willingness or ability to discern whether Booth was the perpetrator or not, she would have more likely claimed she did not recognize him or was unsure. The reasonable inference to draw from these circumstances, therefore, does not assist Booth's case. Indeed, Benjamin had opportunities at the in limine motion hearing and at trial to give in to her fear and recant her identification, but on each occasion she testified under oath as to her certainty that Booth was the perpetrator.

Lastly, Booth refers us to what he calls the "strikingly similar case" of *Clark v. Caspari* (8th Cir. 2001) 274 F.3d 507, 511 (*Clark*). There, the court found that an in-field show-up was suggestive because the witnesses "may have felt obligated to positively identify [the suspects], so as not to disagree with the police, whose actions exhibited their belief that they had apprehended the correct suspects. Essentially, [the witnesses were] given a choice: identify the apprehended suspects, or nobody at all. This coercive scenario increased the possibility of misidentification." (*Clark*, 274 F.3d at p. 511.)

The facts of *Clark* are not strikingly similar at all. In *Clark*, one of the officers was holding a shotgun and standing over the handcuffed suspects at the time of the identification, which contributed to the suggestion that they were the culprits; here, there was no evidence that a shotgun-toting officer was hovering over Booth. (*Clark, supra*, 274 F.3d at p. 511.) Moreover, unlike the situation in *Clark*, the witness in this case was given a written warning before she made her identification, specifically advising her not to feel obligated to identify anyone, not to make "any inference of guilt from law enforcement presence or custody," and it was just as important to free innocent persons as to identify guilty ones. Deputy Henderson also emphasized to Benjamin that the most important thing was for her to be fair and it was unimportant to him whether she could identify the suspect or not. Under these circumstances, the in-field show-up in this case was not unduly suggestive.

Furthermore, in *Clark*, the court held that the identification procedure, albeit suggestive, did *not* result in a violation of the defendant's due process rights, because the witnesses' identifications were reliable. (*Clark, supra*, 274 F.3d at pp. 511-512.) Even though the witnesses in *Clark* had not been able to give police a detailed description of the suspects before the in-field identification, and even though there were inconsistencies in their trial testimony about the suspects, the witnesses' identifications were sufficiently reliable because they had adequate opportunity to view the suspects, only a short time elapsed before the in-field identification, and there was no evidence that the police had actually prompted the witnesses to identify the suspects. (*Id.* at pp. 511-512.) Thus,

although the facts in *Clark* are not strikingly similar to the facts of this case, the result is indeed the same.

Booth fails to demonstrate reversible error.

B. *Confrontation Clause*

Booth contends his constitutional rights were violated when the court barred him from cross-examining Baker regarding her in-prison custody status at the time of trial, including inquiry about her conditions of confinement and potential early release or parole. We begin by examining the in limine proceedings addressing this issue.

1. *In Limine Proceedings*

At the time of her testimony, Baker had been convicted of felony driving under the influence with priors, in violation of Vehicle Code section 23152, subdivision (a). Although she had been granted probation, she violated her probation on November 1, 2007, resulting in her incarceration at the time of the trial in the matter before us.

Booth filed an in limine motion seeking permission to impeach Baker with her conviction for driving under the influence with priors and to ask her questions that might reveal her incarceration. The prosecutor moved in limine for an order that, among other things, would preclude Booth from introducing evidence of Baker's conviction, sentence, and custody status.

Defense counsel argued that Baker's custody status was relevant to her motive in testifying, and he sought to question her with respect to any benefits she expected or received from testifying. The court permitted a hearing under Evidence Code section 402 (402 hearing) to determine if there was any benefit to Baker or promises made to her regarding her testimony.

At the 402 hearing, Baker testified that she suffered her fourth driving under the influence conviction in 2005 and was sentenced to probation; in January 2008, she was imprisoned for probation violations. She asserted that she is a recovering alcoholic and not a criminal. She accepted her consequences, which included prison, but was trying to do well there. A few of her fellow inmates discouraged her from testifying because she would be a "rat." Baker testified that she had been made no promises in regard to

testifying, was not seeking any benefit from the prosecution, and was not appealing or seeking to modify her sentence. She was scheduled to be released from prison in June 2008.

The court, noting that no evidence of favors had been presented, ruled that Baker's sentence was not relevant. The court allowed cross-examination as to the felony conviction "for a DUI with three or more priors," but did not allow inquiry into the facts of the conviction. The court barred reference to her custody status or any questioning about benefits she expected to receive for her cooperation unless defense counsel had a reason to believe she was actually expecting benefits.

At trial, under cross-examination by defense counsel, Baker acknowledged that in 2005 she was convicted of driving under the influence with three priors.

2. *Legal Standard*

The trial court must afford the defense wide latitude to test the credibility of a prosecution witness during cross-examination in a criminal case. (*People v. Belmontes* (1988) 45 Cal.3d 744, 780, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal4th 390, 421 & fn. 22; see Evid. Code, § 780.) The fact that a prosecution witness is in custody might be relevant to the witness's credibility, if the custody itself formed the basis for a deal, or if the fact of custody made the witness more vulnerable to a deal on other pending charges. (*People v. Balderas* (1985) 41 Cal.3d 144, 193; see also *People v. Coyer* (1983) 142 Cal.App.3d 839, 843 [inquiry permitted as to charges then pending against a witness]; *People v. Espinoza* (1977) 73 Cal.App.3d 287, 291 [witness's probationary status relevant where his probation condition prohibited him from using force or violence on any person, which would give him a motive to testify in a particular manner].)

However, the trial court enjoys broad discretion under Evidence Code section 352 to assess whether the probative value of such evidence is outweighed by concerns of undue prejudice, confusion, or consumption of time. (*People v. Brown* (2003) 31 Cal.4th 518, 544-545 (*Brown*); *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) Thus, although a criminal defendant has a Sixth Amendment confrontation right and a due

process right to cross-examine adverse witnesses, including to expose a witness's bias or motive to lie, the trial court retains discretion to restrict cross-examination that is prejudicial, confuses the issues, or is of marginal relevance. (*People v. Ayala* (2000) 23 Cal.4th 225, 301.) We therefore review the court's decision for an abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 201.)

3. *Analysis*

The court did not abuse its discretion in precluding the defense from cross-examining Baker on her prison sentence at the time of trial. There was no indication that Baker had been promised more favorable treatment, early release, or any other benefit from testifying. To the contrary, the testimony at the 402 hearing was that she neither received nor was promised any benefit from testifying. Nor were there any new charges pending against her. There was no evidence, therefore, from which to infer an untoward motive or pro-prosecution bias from the fact of her incarceration. As our Supreme Court has observed: " '[U]nless the defendant can show that the prohibited cross-examination would have produced "a significantly different impression of [the witnesses'] credibility", the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment.' " (*Brown, supra*, 31 Cal.4th at pp. 545-546, citations omitted.)

Booth argues that the trial court should not have required the defense to show anything other than the mere fact of her incarceration in order to be able to cross-examine her on this issue at trial. In support of this proposition, he quotes the following statement from the decision in *Balderas*: the lower court "was probably wrong if it believed that counsel must make a *prima facie* case on the witness' motivation before exploring the issue by direct examination of the witness." (*Balderas, supra*, 41 Cal.3d at p. 193.) Thus, Booth argues, the court here was wrong in believing that Booth's right to cross-examine Baker on her purported bias was dependent upon him demonstrating that the prosecution had promised her favors in return for her testimony.

We disagree. First, the statement in *Balderas* is mere dictum and thus has no precedential value. Second, the trial court in *Balderas* had made its decision in chambers based on defense counsel's representations and limited examination; here, by contrast,

the court made its decision after *a full 402 hearing*, at which defense counsel freely cross-examined witness Baker. Third, the trial court in this case did not deny defense counsel's cross-examination request because of the defense's failure to make a *prima facie* case of a promised benefit to Baker, but because the defense was unable to come up with *any evidence at all* of such a benefit.

We also note that the record provides no indication that Baker's incarceration affected her testimony at trial in any way. She testified that she saw Booth take off his blue shirt, discard it, and hop the fence in an orange shirt. The accuracy of her observations was borne out by the fact that Booth was wearing a blue shirt inside the Kiesel residence, the blue shirt contained Kiesel's diamond earrings, and Booth was later found in a orange shirt. Furthermore, her testimony at trial (while incarcerated) was consistent with whatever she told police (before her incarceration) that led them to find Booth, his shirt, and Kiesel's earrings. Nothing about her imprisonment changed her account or the evidence that corroborated it, and any error in precluding cross-examination on this point was plainly harmless.[7]

Booth fails to establish that the court's precluding him from questioning Baker about her custody status constituted reversible error.

C. *Uncharged Offenses*

Booth next contends the court abused its discretion in admitting evidence of his following past conduct: he gained entry into a Mill Valley home in 1990 by breaking a window and was caught inside the home holding the resident's camera; and he attempted to gain entry into a Petaluma home in 1997 through a window. The court found the evidence admissible to show Booth's intent in committing the burglary alleged in count one, pursuant to Evidence Code section 1101, subdivision (b). The court further found that the probative value of the evidence outweighed its prejudicial effect under Evidence Code section 352. As a result of these rulings, the parties stipulated to the description

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[7] The fact that Baker was in prison *at the time of trial* was obviously irrelevant to her ability to perceive Booth take off his blue shirt and hop the fence in his orange shirt. It was also irrelevant to her state of mind when she told police what Booth had done.

read at trial concerning the 1990 Mill Valley incident, and victim Lantier testified about the 1997 Petaluma incident.

1. *1990 Mill Valley Incident*

Evidence Code section 1101, subdivision (a), generally precludes evidence of a defendant's character or character trait, including prior bad conduct, when offered to prove his conduct on a specified occasion. However, subdivision (b) of Evidence Code section 1101 permits evidence of prior bad conduct (such as uncharged criminal offenses) to prove a fact such as the intent with which the defendant acted in committing the act underlying the charged offense.

To be admissible to show intent, the prior conduct and the charged offense need only be sufficiently similar to support the inference that the defendant probably harbored the same intent in each instance. (*People v. Cole* (2004) 33 Cal.4th 1158, 1194.) We review for an abuse of discretion. (*People v. Carter* (2005) 36 Cal.4th 1114, 1149.)

By pleading not guilty, Booth placed all the elements of the burglary charge in dispute at trial, including his intent in entering the Kiesel home. (*People v. Roldan* (2005) 35 Cal.4th 646, 705-706, disapproved on other grounds in *Doolin*, *supra*, 45 Cal.4th at p. 421 & fn. 22.) The evidence that Booth entered the Mill Valley home through a window, was seen inside holding the resident's 35 millimeter camera, and pled guilty to a charge of residential burglary, was relevant to his intent in entering the Kiesel home. The court did not abuse its discretion in concluding that the Mill Valley incident was sufficiently similar to the Kiesel burglary to justify its admission under Evidence Code section 1101, subdivision (b), and indeed Booth does not contend to the contrary.

Booth argues that admission of the evidence was nonetheless unduly prejudicial under Evidence Code section 352, because the jury was likely to use the evidence to evoke an emotional bias against him. We review a ruling under Evidence Code section 352 for an abuse of discretion. (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.)

We disagree with Booth's contention. There was nothing heinous or particularly inflammatory about the Mill Valley incident, or anything that would evoke an emotional bias against Booth. Furthermore, the jury was instructed with the proper use of evidence

of an uncharged offense to prove intent (CALCRIM No. 375) and with the use of limited purpose evidence generally (CALCRIM No. 303). The jury is presumed to have followed the trial court's instructions, and there is no indication it did not. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) The court did not err in admitting evidence of the 1990 Mill Valley incident.

2. *1997 Petaluma Incident*

Booth argues that the 1997 Petaluma incident was not sufficiently similar to the Kiesel burglary to justify its admission under Evidence Code section 1101, subdivision (b). The Kiesel burglary occurred in the afternoon in Kentfield when the suspect entered an unoccupied single-family residence through a window after the suspect knocked on the front door; the 1997 burglary occurred in the evening in Petaluma when Booth, intoxicated, *attempted* to enter an occupied residence through a kitchen window. He was not caught with any stolen items, and in fact never even entered the house all the way because the resident hit him with a baseball bat. Furthermore, he was described by the homeowner as "crazed-eyed and greatly under the influence."

Respondent urges that an intent to steal can be *inferred* from the facts of the 1997 Petaluma incident, and the prior incident was sufficiently similar to the Kiesel burglary. We note as well that Booth pled guilty and was convicted of burglary in regard to the 1997 Petaluma incident. Nonetheless, we need not resolve the issue, or decide whether such evidence should have been excluded under Evidence Code section 352, because the admission of the evidence was harmless even if erroneous.

3. *Harmless Error*

Even if the court should not have admitted evidence of the 1997 Petaluma incident, such error is harmless because it is not reasonably likely that the jury would have returned a more favorable verdict without the evidence. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)[8]

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[8] Booth claims that the admission of the evidence violated his Fifth, Sixth, and Fourteenth Amendment rights to due process and a fundamentally fair trial, and that we should therefore apply the harmless error standard of *Chapman v. California* (1967) 386

The evidence against Booth was overwhelming. Booth was seen in a blue shirt knocking on Kiesel's door and then walking around to the rear of the residence, where a broken window was later discovered. Booth was seen inside Kiesel's house, where cabinets had been opened and rooms had been ransacked. When Deputy Henderson asked Booth if he had been inside Kiesel's home, Booth fled. Kiesel's diamond earrings were found in the blue shirt Baker saw Booth discard. Booth was identified by Benjamin as the man inside Kiesel's home, by Deputy Henderson as the man he confronted outside Kiesel's home, and by Baker as the man who took off his blue shirt.

Furthermore, admission of the 1997 Petaluma incident was harmless in light of the proper admission of the 1990 Mill Valley incident. There is no indication that the jury would have returned a verdict more favorable to Booth if it had not learned he was caught attempting to break into the Petaluma residence, since it had otherwise learned he was convicted of burglary after being caught actually inside the Mill Valley residence holding the resident's property.

Booth fails to establish reversible error.

D. *Prosecutorial Misconduct*

Booth contends the prosecutor committed misconduct, based on the following excerpts from the prosecutor's closing argument: "There is no defense in this case, ladies and gentlemen. The reason why we're here is that the defendant has a constitutional right to a jury trial. . . . He can't be faulted for exercising that right, and we are here to go through the motions, ladies and gentlemen. [¶] . . .. [¶] . . . [W]e're here because the defendant is exercising his right to a jury trial. Perhaps he's hoping that my witnesses wouldn't show up or some of the evidence wouldn't come in. [¶]. . . [¶] . . . And to answer your question, 'what are we doing here?' Well, we're running through the procedures. We're going through the motions."

U.S. 18, 24. We disagree. The appropriate standard under the circumstances of this case is the *Watson* standard. In any event, we would reach the same conclusion under the *Chapman* standard.

1. *Forfeiture and Waiver*

Booth did not object to the prosecutor's argument in the trial court. His claim of prosecutorial misconduct is therefore forfeited. (*People v. Wilson* (2008) 44 Cal.4th 758, 800.)

Booth attempts to avoid this forfeiture by claiming that any objection by defense counsel or admonition from the trial court would have only "called unwarranted attention to the prosecutor's improper arguments, while not serving to dissipate their harm," because the prosecutor intermingled proper argument with improper argument. "Because of the unique juxtaposition of proper and improper argument in this case, there was no effective way for the trial court to admonish the jury without causing more damage to the appellant's rights than was already inflicted by the prosecutor."

Booth's argument is utterly unconvincing. Having reviewed the record, we are quite confident that defense counsel and the trial court were capable of crafting an admonition that would have addressed what Booth now contends to be improper about the prosecutor's statements. Indeed, defense counsel addressed those aspects of the prosecutor's closing argument in his own closing argument. While defense counsel might have reasonably concluded, as a tactical matter, that it was unwise or unnecessary to object to the prosecutor's statements, he nonetheless waived or forfeited the right to challenge them on appeal.

2. *Merits*

Even if Booth's prosecutorial misconduct claim were cognizable in this appeal, it has no merit. In context, the prosecutor's statements constituted a fair comment on the evidence. (*People v. Wharton* (1991) 53 Cal.3d 522, 567.)

Booth argues that by saying he was exercising his right to a trial, the prosecutor was disparaging him for exercising his Sixth Amendment right to trial by jury. He refers us to *People v. Patino* (1979) 95 Cal.App.3d 11, in which the court described the relevant portion of the prosecutor's closing argument as follows: "The prosecutor told the jury that a quotation from a famous judge presented the prosecutor's side of the case. The prosecutor then read the following quotation: 'Under our procedure, the accused has

every advantage. While the prosecution is held rigidly to the charge, he need not disclose even the barest outline of his defense. [¶] He may not be convicted when there is the least fair doubt in the mind of even one juror. Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream. [¶] What we really need to fear is the archaic formalism and watery sentiment that obstruct, delay, and defeat the prosecution of crime." (*Id*. at p. 29.) The appellate court condemned the prosecutor's use of that quotation as misconduct, because it constituted an attack on our criminal justice system and our laws. (*Id*. at p. 30.)

The statements of the prosecutor in the matter before us obviously come nowhere close to the quotation by the prosecutor in *Patino*. Here, the prosecutor did not disparage the criminal justice system at all. While he stated that the reason the trial was occurring was because a defendant has a right to a jury trial, the prosecutor repeatedly emphasized that Booth should *not* be faulted for his insistence on a jury trial.

Booth further argues: "But perhaps the most pernicious evil in the prosecutor's argument is that he effectively told the jurors they did not have to seriously fulfill their roles as impartial arbiters of the evidence. By twice telling the jurors that everyone was merely 'going through the motions' because [Booth] was forcing them to, he conveyed to the jurors that they played only a pro forma role, as opposed to their role of standing between the state and the defense as judges of the evidence."

Again, Booth's argument is untenable. In context, there is no way the reference to "going through the motions" could have suggested to the jury that it had no meaningful role in the case. Immediately after the prosecutor stated, "[w]e're going through the motions," he told the jury that the right to a jury trial is "an important right" that all of us have, the jury had an "important decision" to make, and he was sure the jury would "take that very seriously and really process all the evidence and try to make sure [it is] making the right decision." While Booth challenges a few introductory lines of the prosecutor's argument, over 25 *pages* of the reporter's transcript records the prosecutor's step-by-step analysis of the evidence supporting the elements of the charges, the instructions in the case, and the inferences he urged the jury to draw. The reference to "going through the

motions" might have suggested the prosecutor was arguing that no reasonable person, including Booth, could have seriously thought there was a reasonable doubt as to his guilt, but it most certainly did not inform the jury that it had nothing to do.

Moreover, even if the prosecutor's comments had created any confusion, the jury was instructed that nothing the attorneys say is evidence, and that Booth should not be convicted unless the prosecutor proved each element of the charge beyond a reasonable doubt. The court further instructed the jury that it must follow the court's instructions if there appears to be any conflict between those instructions and the attorney's comments. It is presumed that " 'the jury treated the court's instructions as statements of law, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.' " (*People v. Morales* (2001) 25 Cal.4th 34, 47.)

Booth fails to establish reversible error.

III. *DISPOSITION*

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P. J.

BRUINIERS, J.